STATE OF CONNECTICUT
DEPARTMENT OF PUBLIC HEALTH
PUBLIC HEALTH HEARING OFFICE

In Re: Albert Dawley
Subsurface Sewage Disposal System Installer
License No. 002356

Petition No. 2004-0309-033-001

MEMORANDUM OF DECISION

Procedural History

On February 7, 2005, the Department of Public Health ("the Department") filed a Statement of Charges against Albert Dawley ("respondent") notifying him that the Department was proposing to revoke or take other disciplinary action against his subsurface sewage disposal system installer's license ("the license"). Rec. Exh. 1.

On February 28, 2005, the Department issued a Notice of Hearing in which the Commissioner of the Department appointed Olinda Morales, Esq., as the Hearing Officer to rule on all motions and to recommend findings of fact and conclusions of law. Rec. Exh. 3.

On March 21, 2005, respondent filed an Answer to the Charges denying the factual allegations in the Statement of Charges. Rec. Exh. 2. On May 5, 2005, the Department filed a Motion to Amend the Statement of Charges ("the Motion") along with the Amended Statement of Charges ("the Charges"). Rec. Exh. 5.

On May 9, 2005, an administrative hearing was held, and the Motion was granted. The hearing was conducted in accordance with Chapter 54 of the Connecticut General Statutes (the Uniform Administrative Procedure Act) and §§19a-9-1, et seq. of the Regulations of Connecticut State Agencies ("the Regulations"). Respondent appeared *pro se,* and Attorney Linda Fazzina represented the Department at the hearing.

On September 2, 2005, a Proposed Memorandum of Decision was issued. On September 9, 2005, respondent's attorney, Beth A. Steele, filed an appearance and requested oral argument and the opportunity to file briefs and exceptions. On October 5, 2005, respondent filed a Brief in Opposition to the Proposed Memorandum of Decision; and, on October 19, 2005, the Department filed a Post Hearing Reply Brief. On November 1, 2005, the undersigned was designated by the Commissioner of the Department to rule on all motions and determine findings of fact and conclusions of law, and issue a final decision. Oral argument was held on November 1, 2005. Attorney Linda Fazzina represented the

Department, and Attorney Steele represented respondent at the oral argument.

This decision is based entirely on the record and sets forth findings of fact, conclusions of law, and a final order.

Allegations

1. In paragraph 1 of the Charges, the Department alleges that respondent is, and has been at all times referenced in the Charges, the holder of Connecticut subsurface sewage disposal system installer license number 002356.

2. In paragraph 2 of the Charges, the Department alleges that in or about September 2002, respondent illegally, incompetently and/or negligently installed a subsurface sewage disposal system at 211 Pautipaug Hill Road, Baltic, CT in one or more of the following ways, in that he:

   a. failed to install the building sewer at the grade required in §III(A) of the Technical Standards for the Design and Construction of Subsurface Sewage Disposal ("the Technical Standards");

   b. failed to install the septic tank so that the outlet invert and the inlet invert were at the elevation(s) required by §V(A)(2) of the Technical Standards;

   c. failed to use fill material that meets the gradation criteria of §VIII(A) of the Technical Standards; and/or

   d. failed to install the leaching galleries and/or distribution piping at the elevation(s) required in the engineering plan, thereby resulting in an undersized leaching system.

3. In paragraph 3 of the Charges, the Department alleges that the above-described facts constitute grounds for disciplinary action pursuant to *Conn. Gen. Stat.* §2034(f)(b), taken in conjunction with §§19-13B1O3d(b) and/or 19-13BI03e(e)(2) of the Regulations and/or §§III(A), V(A)(2), VIII(A) and/or VIII(D) of the Technical Standards.

Findings of Fact

1. At all relevant times, respondent has held Connecticut subsurface sewage disposal system installer license number 002356. Rec. Exh. 2.

2. On or about April 30, 2002, Joseph Ososwski, Ann Marie Ososwski, Todd Ososwski, and Loree Ososwski, owners of the property ("the owners"), contracted with respondent to install a sewage disposal system ("the system") at 11 Pautipaug Hill Road, Baltic, CT ("the property") for a total of $22,850.00. The owners paid respondent $11,400.00 at the commencement of the project, and the remainder upon completion of the project. Dept. Exhs. 2, 3; Tr. 11130/00, pp. 32.

3. The new system replaced an existing system. Tr. p. 35, 41-42.

4. The system depended on gravity to move the waste, and required the installation of a building sewer,[1] a septic tank, distributing pipes, and two concrete galleries in a leaching field, each of which had an associated distribution box ("D-box"). Dept. Exh. 1; Tr. pp. 54-57.

5. Sewage in the new system was intended to flow by gravitational force, downward from the structure, through the building sewer, to the septic tank inlet invert, which directs the liquids to one compartment of the septic tank, and the solids to another. The solid waste, floatable fats, oils and greases settle in the septic tank to be pumped out periodically. All tanks are designed so that when the tank is installed on a level, the inlet invert of the septic tank is three inches higher than the outlet invert. Tr. pp. 49-53, 59-61.

6. The liquid waste exits from the septic tank, through the outlet invert of the tank and flows through a distribution pipe to the leaching system which consists of two concrete galleries, each of which has a D-box, and distribution piping. The galleries were required to be installed at differing elevations such that there is an upper gallery and a lower gallery. The D-box for each gallery distributes the liquid waste to its respective gallery. When the upper gallery is full, waste seeps through the leaching field down to the lower gallery. When the lower gallery is full, waste seeps into the leaching field. Tr. pp. 49-53, 59-61, 76-77.

7. The Technical Standards require that leaching systems be installed at least 18 inches above the ground water level and ledges so that liquid waste can permeate through the soil. In this case, in order to attain at least 18 inches separating distance between the leaching system and the ground water level, the leaching system was required to be installed at an elevation above ground level. Additionally, since topsoil is not sufficiently permeable to permit adequate drainage, the topsoil was required to be removed and replaced with fill. Tr. pp. 51-57.

8. Since the leaching system was required to be elevated above ground level, the other component parts of the system were necessarily located even higher than the leaching system to ensure the downward flow of sewage as it passed through the entire system by gravitational force. Tr. pp. 53-57.

9. The building sewer was required to be positioned at 106.9 feet, with the septic tank at 103.5 feet. Thus, the building sewer pipe from the structure to the septic tank was required to slant downhill from 106.9 feet to 103.5 feet. Dept. Exh. 1.

10. One side of the upper gallery D-box was required to be positioned at 102.56, and the other side at 102.9 feet, with the upper gallery located at 102.4 feet. The lower

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1. Building sewer means a sewer pipe extending from the building served to the septic tank. . . . *See,* Technical Standards §I(H).

gallery D-box was to be located at 101.56 feet with the gallery itself located at 101.4 feet. Dept. Exh. 1.

11. The proposed septic system, as designed, met the Technical Standards. Tr. pp. 126-127.

12. On or about September 2002, respondent completed installation of the system. Dept. Exh. 2; Tr. pp. 32, 191.

13. Respondent installed the building sewer so that the portion of the pipe by the septic tank was higher than the portion of the pipe that was coming from the house (*i.e.*, it was pitched back towards the house), and a "belly" formed in the pipe in which solids and liquids may settle and cause clogging. Tr. p. 131-132.

14. Respondent did not install the septic tank on a level. As a result, outlet invert was higher than the inlet invert (*i.e.*, the opposite of what it should have been), and the tank failed to function properly. Tr. pp. 82 and 97.

15. Respondent used a substandard fill in the leaching field. The required select fill material prescribed in the Plan met the requirements of the Technical Standards, which requires that only 0-5% of small particles pass through a #200 sieve when using a sieve analysis. However, the select fill material installed by respondent did not comply with the Plan and/or Technical Standards in that 9% of small particles passed through the #200 sieve using sieve analysis. When substandard fill is used, and liquid waste will not drain freely. Dept. Exhs. 1,4,5; Tr. pp. 67-70, 82-85, 97, 122, 212.

16. On September 15, 2004, the upper gallery D-box was out of level by several inches which resulted in less than a 100% utilization of the upper gallery and placed a greater burden on the lower gallery; the lower gallery was three inches lower than required by the design plan; and, there was five inches of fill over the ends of the lower gallery (the minimum should be 6 inches, and the design plan called for approximately 12 inches of fill). As a result, the system is deficient in size and is not able to distribute the waste sufficiently. Dept. Exh. 4, 5, and 6; Tr. pp. 63, 82, 90, 97, 109-114, 132, 210.

17. A properly designed and installed septic system can be expected to provide service for approximately 40 years. Tr. p. 214.

18. Since at least the winter of 2004, respondent has been aware that the system was defective. While respondent made minimal and substandard efforts to repair the system, as of the day of the hearing, respondent had not made any further attempts to repair the system. Dept. Exh. 2; Tr. pp. 90, 142.

Discussion and Conclusions of Law

Section 20-34lf(d) of the Statutes provides, in pertinent part, that the Department may

take action under section §19a-17 of the Statutes against an installer who engages in "illegal, incompetent or negligent conduct. . . in his work. . . ." In establishing such a violation the Department bears the burden of proof by a preponderance of the evidence. *Swiller v. Comm'r. of Public Health*, CV-950705601, Superior Court, J.D. Hartford/New Britain at Hartford, October 10, 1995; *Steadman v. SEC*, 450 U.S. 91, 101 S. Ct. 999, *reh'g den.*, 451 U.S. 933 (1981); *Bender v. Clark,* 744 F. 2d 1424 (lOth Cir. 1984); *Sea Island Broadcasting Corp. v. F.CC,* 627 F. 2d 240,243 (D.C. Cir. 1980); all as cited in *Bridgeport Ambulance Service, Inc., v. Connecticut Dept. of Health Services,* No. CV 88 0349673-S (Sup. Court, J.D. Hartford/New Britain at Hartford, July 6, 1989).

The Department proved the allegations contained in the Charges by a preponderance of the evidence.

In paragraph 2a of the Charges, the Department alleges that respondent failed to install the building sewer at the grade required in §III(A) of the Technical Standards. This section requires that ". . . [t]he grade shall be at least one-quarter inch per foot for four-inch sewers and shall be not less than on-eighth inch per foot for larger sizes. . . ." Since the system required a four-inch building sewer, respondent was required to construct a system that sloped towards the septic tank at the pitch of at least one-quarter inch per foot. The Plan called for a three-foot drop in elevation between the point where the building sewer exits the house and the point where it enters the septic tank. The Department proved by a preponderance of the evidence that, instead of sloping towards the tank, the building sewer sloped downward from the tank towards the structure, and contained a "belly" in the pipe in which solids and liquids may settle and cause clogging.

In paragraph 2b of the Charges, the Department alleges that respondent failed to install the septic tank so that the outlet invert and the inlet invert were at the elevations required by §V(A)(2) of the Technical Standards. This section requires that "[t]he outlet invert of the septic tank shall be three inches lower than the liquid level. The final positioning of the tank during installation shall result in an elevation change between the inlet invert and the outlet invert of 2 and four inches." The evidence is sufficient to establish that respondent failed to install the septic tank so that the inlet and outlet inverts were at the elevations required by the Technical Standards, as alleged. When the septic tank invert elevations are incorrect, the tank will accumulate an excessive amount of liquid, which may

then back up within the septic tank causing clogging. This problem was compounded by the fact that the building sewer was incorrectly sloped, further compounding the owners' sewage problems.

In paragraph 2c of the Charges, the Department alleges that respondent failed to use fill material that meets the gradation criteria of §VIII(A) of the Technical Standards. The Department sustained its burden of proof. This section provides for a gradation requirement on the particle size of select fill material placed within the leaching area. Moreover, respondent was required to use heavy equipment such as bulldozers in order to place select fill material in six-inch lifts and compact it properly to avoid settlement. In the instant case, the fill material prescribed in the Plan met the requirements of the Technical Standards. However, a test performed on the select fill material respondent actually used, revealed that the select fill material did *not* comply with the Plan or the Technical Standards in that 9% of small particles passed through a #200 sieve instead of the allowable 0-5%. Thus, the Department met its burden of proof. Respondent argued he believed he was purchasing and installing the correct fill. Respondent's claim in this regard is not credible, and respondent failed to present any evidence in support of this claim. Moreover, the Department established that respondent should have visually recognized that the fill did not comply with the Plan or Technical Standards due to the "tremendous amount of fines" in the fill. Tr. p. 217. Finally, licensed installers are ultimately responsible for ensuring that the correct fill is used. Tr. pp. 72 and 75.

In paragraph 2d of the Charges, the Department alleges that respondent failed to install the leaching galleries and/or distribution piping at the elevations required in the engineering plan, thereby resulting in an undersized leaching system. Section VIII.F of the Technical Standards specifies that the requisite leaching area size for residential systems is dependent on the number of bedrooms in the house and the percolation rate of the soils into which the system is to be placed. *See*, Section VIII.D. In the instant case, the engineer designed the galleries to be 12 inches high, which is the smallest system permitted by the Technical Standards for this five-bedroom house. Respondent was also required to install the gallery rows at the elevations prescribed by the Plan in order to ensure that the upper gallery would fill up completely before effluent would be directed to the lower gallery.

A preponderance of evidence establishes that the upper gallery D-box and the lower

gallery are not located as required by the Plan. The D-box is out of level by several inches and thus directs effluent to the lower gallery before the upper gallery is full, resulting in less than 100% utilization of the upper gallery and placing a greater burden on the lower gallery. Moreover, the lower gallery is three inches lower than required by the Plan. These defects result in a system (which was already the smallest sized system permitted by the Technical Standards for the given parameters) that is undersized for the home.

In his defense to all of the Charges, respondent claims that: (1) the problems arose out of the homeowners' use of water softener; (2) the system must have been installed correctly because the inspector approved it; (3) horses damaged the system by running on top of it; and/or (4) the property had "settled." During oral argument, respondent also claimed that use of the improper fill resulted in parts of the system falling out of elevation and sloping improperly. This last claim was not raised during the hearing and was not supported by any evidence. Therefore, it was considered to be an insufficient defense to each of the claims.

With regard to the first defense that the homeowner's alleged use of water softener caused the damage to the system, the Department presented sufficient rebuttal evidence to establish that this system was not damaged in the manner in which water softeners damage water systems. Thus, this defense is wholly unsupported by the record. In particular, Mr. Scully testified that the damage caused by water softeners includes: an excess of water passing through the system; a "black, gooey substance" in the distribution boxes; chlorides that effect the concrete in the system; iron and manganese that may settle in the septic tank; and, minerals that may seep into the leaching fields. Since the record is devoid of any evidence establishing that these conditions exist in this system, this defense lacks merit.

With regard to respondent's claim that the system was installed correctly because the inspector approved it, the evidence is also insufficient to support this claim since no inspection reports or approvals were submitted, and the inspector did not testify. Moreover, even if the inspector had approved a faulty system, such approval would not render a defective system, acceptable; and, respondent, rather than an inspector, is responsible for his own compliance with the standards that govern his licensed practice. Thus, this defense is also without merit.

Respondent also claims that he installed the system at all of the correct elevations, but that the system components moved as a result of horses running over the property or because

the property had "settled." The hearing officer considered this claim very seriously, as it may have provided an explanation for the mis-placement of nearly every aspect of the system. However, after a full review of the record, a preponderance of the evidence nevertheless supports the allegations.

With regard to the building sewer and the tank, which are located in naturally occurring soil (as opposed to the fill), respondent claims that they were installed at the correct elevations, but shifted their positions because they were located where the old tank had been removed and the soil was "soft." Tr. p. 173. However, the evidence establishes that only the building sewer ran across the area where the former tank had been located. The new tank was some distance away. Dept. Exh. 1. Thus, this defense has no relevance to the allegations concerning the placement of the septic tank.

With regard to the building sewer line, respondent's defense is also insufficient. The record establishes that the total distance from the house to the new tank was 64 feet, in a straight line. The Plan required that respondent retain approximately 25 feet of the original building sewer that was connected to the house, and connect it to a new building sewer pipe that then ran approximately 40 more feet to the new tank. The old tank had been located approximately 15 feet from the connection of the old pipe to the new pipe; the new tank was located approximately 20 feet further away from the location of the old tank.

The evidence also establishes that building sewer lines are very rigid, strong pipes. In this case, the piping consists of four inch, Schedule 40 piping, which is a heavy duty plastic pipe. Tr. pp 43-44. While respondent claims that the sewer building piping bent due to the "soft" soil where the former tank was located, he failed to establish that the "belly" in the piping occurred where the old tank had been removed, or that the allegedly "soft" soil contributed in any way to the creation of a bend, or "belly," in the pipe. Since only a small portion of the piping ran across the area where the old tank was removed, and the piping was very strong, in the absence of additional evidence in support of this defense, respondent's claim in this regard is pure speculation, unsupported by any substantial evidence.

With regard to the mis-location of the upper gallery D-box and the lower gallery, these components of the system were located in the fill. Even considering respondent's defense, a preponderance of the evidence, nevertheless, supports the allegations. Specifically, the evidence consists of (1) uncontroverted proof that the upper gallery D-box

and lower gallery were not at the correct elevations approximately one year after installation; (2) credible testimony that components of a septic system do not change elevation unless the fill has not been properly compacted, and (3) respondent's assertion that he properly compacted the fill (*see, e.g.*, pp. 166, 189) and the absence of evidence to the contrary.

With regard to the horses, Mr. Scully testified:

> I cannot see that the horses could cause a gallery row to sink down into the ground or change the distribution piping. All systems are covered with a certain amount of cover. When the leaching system is installed, the installer's responsibility is to use heavy equipment, like bulldozers, that puts the fill down in six-inch lifts and basically compacts it properly, so they can support the leaching structures to avoid settlement. So, no. I would not think that the horses could have caused these violations to appear.

Tr. p. 122.

Mr. Scully further testified,

> Q: . . . the word that I heard quite frequently throughout [Mr. Dawley's] testimony was everything settled, correct?
>
> A: I did hear that for the explanation for the building sewer, the piping, the galleries.
>
> Q: Is this something that you commonly see with septic systems that are installed in the State of Connecticut?
>
> A: No. Clearly, the standard of practice for installing a septic system is to make sure that materials, like fill, are properly compacted, so that you have a nice stable fill package, so that you don't have settling.
>
> Issues with piping, clearly the strength of these plastic piping lies in the backfill, the material that supports it, the material that's underneath it. If you're removing a septic tank and leaving a large void and they're going to be putting a new pipe through that area, clearly, you have to make sure that there is material that's filled the excavation, that is properly compacted, that the pipe is having the required support to avoid deformation of the pipe or even failure of the pipe.
>
> I mean these are plastic pipes, and, clearly lack of proper installation could lead to that. But, again, if you install piping, a gallery system if you install it correctly with proper backfill and bedding, no, we should not be having issues with settling.

Tr. pp. 213-14.

Thus, in the absence of any evidence that the fill was not properly compacted, and in light of respondent's claim that he properly compacted the fill, a preponderance of evidence establishes that the upper gallery D-box and lower gallery could not have changed positions after being installed, and that respondent improperly installed the upper gallery D-box and

lower gallery.

Based on the foregoing, a preponderance of the evidence establishes each of the allegations contained in the Charges.

While respondent has no prior disciplinary action, he received a formal warning from the Department, after he agreed to correct violations and complete an installation for another homeowner. However, he only corrected and completed the installation after numerous communications from the Department over many months. The problem with that installation also concerned grading issues. Tr. pp. 142-143.

In March 2004, the Department requested that respondent contact the property owner in this case to make corrections to the system. Instead, respondent initially denied any responsibility for the defective system. As of the date of the hearing, the building sewer continues to slope in the wrong direction, even though respondent attempted to correct it, and respondent did not adequately correct any of the other problems with the system. At the conclusion of the hearing, respondent testified that he will take responsibility for any parts of the system that are not level. Tr. p. 195. However, he continues to disavow responsibility for using the wrong fill. The record is also silent as to whether respondent has made any restitution to the homeowners. Thus, there is no substantial mitigating evidence.

The Department requests the imposition of a $20,000 civil penalty and a two-year probation with certain terms and conditions. If this complaint concerned only one or two aspects of the system, the proposed penalty may be appropriate. However, in light of the fact that virtually every component of the system was negligently installed at a cost to the homeowner of $22,850.00, and considering respondent's wholly inadequate and belated efforts to repair the system, as well as his failure to present any proof of restitution, a revocation is warranted. After a full review of the record, the evidence establishes that respondent's negligence is reflected in every aspect of the project from beginning to end. Therefore, and in the absence of any mitigating evidence, respondent's license should be revoked.

Proposed Order

Based on the record in this case, the above Findings of Fact and Conclusions of Law, and pursuant to section 19a-17(a), subsurface sewage disposal system installer license number 002356 of Albert Dawley is hereby revoked.

This Order is effective upon signature.

Jan 31, 2006
Date

Donna Buntaine Brewer, Esq.
Hearing Officer